

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DARNEY RAY WHITE,	)	No. CV-F-05-946 REC
	)	(No. CR-F-03-5308 REC)
)	
Petitioner,	)	ORDER ACCEPTING JURISDICTION
	)	OF PETITIONER'S MOTION FOR
vs.	)	RELIEF PURSUANT TO 28 U.S.C.
	)	§ 2255 AND DIRECTING
	)	PETITIONER TO FILE WAIVER OF
UNITED STATES OF AMERICA,	)	ATTORNEY-CLIENT PRIVILEGE
	)	WITHIN 30 DAYS OF FILING
	)	DATE OF ORDER
Respondent.)	
)	
)	

On July 25, 2005, petitioner Darney Ray White filed a timely motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner was charged with armed bank robbery in violation of 18 U.S.C. § 2113(a). Petitioner pleaded guilty pursuant to a written plea agreement. The plea agreement specifically provided that petitioner's sentence would be determined by the Sentencing Guidelines, although the United States agreed to recommend that petitioner be sentenced at the low end of the guideline range.

1 The plea agreement specifically provided:

2 The defendant understands that the law gives
3 him a right to appeal his conviction and
4 sentence. He agrees as part of his plea,
5 however, to give up this right as long as his
6 sentence is consistent with the agreement set
7 forth above.

8 The defendant also gives up any right he may
9 have to bring a post-conviction attack on his
10 conviction or sentence. He specifically
11 agrees not to file a motion under 28 U.S.C. §
12 2255 or 2241 attacking his conviction or
13 sentence.

14 Petitioner was sentenced on September 13, 2004 to 77 months
15 incarceration, which was the low end of the guideline range of 77
16 to 96 months. No appeal was filed.

17 On March 25, 2005, petitioner filed a "Motion for Recall of
18 Sentence or Modification of Sentence" wherein he contended that
19 he is entitled to be resentenced because of the Supreme Court's
20 decisions in United States v. Booker, 125 S.Ct. 738 (2005) and
21 Blakely v. Washington, 124 S.Ct. 2531 (2004) and contending that
22 he did not file an appeal because his attorney did not properly
23 advise him on his right to appeal. See White v. United States,
24 No. CV-F-05-407 REC. By Order filed on April 7, 2005, the court
25 deemed the motion for recall of sentence or modification of
26 sentence to be a motion to vacate, set aside or correct sentence
27 pursuant to 28 U.S.C. § 2255 and denied the deemed Section 2255
28 motion. Judgment for respondent was entered on April 7, 2005.
29 No appeal was filed by petitioner.

30 In the instant Section 2255 motion, petitioner asserts three
31 grounds for relief.

1 As Ground One, petitioner asserts that the plea agreement is
2 "inadmissible" was misrepresented to petitioner by defense
3 counsel. Petitioner contends:

4 Defendant was on psychiatric meds at the time
5 he signed to plea agreement. Defendant's
6 attorney told defendant that she would remove
7 him giving up his right to appeal, and did
8 not inform him that he would be giving up his
9 right to challenge any part of his
10 conviction. Defendant also was not cleared
11 by a psychiatric doctor, that he was making a
12 sane decision. The court did not inform
13 defendant that they had to consider
14 guidelines, but may depart from them under
15 some circumstances by law. And those
16 circumstances apply to this defendant.

17 As Ground Two, petitioner asserts that he "was not cleared
18 as competent by a doctor". Petitioner contends:

19 At one point in the case, the court
20 considered sending defendant to mental
21 hospital for evaluation, due to his previous
22 [sic] mental, and present, mental conditions.
23 Defendant was not cleared competent to stand
24 trial by a doctor, at the time he signed his
25 plea agreement, or after. The doctor he did
26 see, recommended a downward departure, due to
27 defendant's mental condition, at the time of
28 the crime, and at the time of the court
29 proceedings. Defendant's attorney held back
30 the true facts of this agreement from
31 defendant.

32 As Ground Three, petitioner asserts that he "never believed
33 he was giving up his right to appeal". Petitioner contends:

34 When Defendant signed the deal for lower
35 term, defendant was told by court appointed
36 counsel that she would make sure that he
37 would not give up his right to appeal, if he
38 signed the deal. Also the defendant was
39 medicated, when he signed the deal, and
40 trusted his counsel.

41 A. Second or Successive Motion.

1 Because the court deemed petitioner's motion filed on March
2 25, 2005 to be a motion for relief pursuant to Section 2255, the
3 court must address whether it has jurisdiction to consider the
4 instant motion.

5 Pursuant to the AEDPA, petitioner must move in the Ninth
6 Circuit Court of Appeals for an order authorizing the district
7 court to consider a second or successive Section 2255 motion. 28
8 U.S.C. §§ 2244(b)(3) and 2255. If a petitioner has previously
9 sought relief pursuant to Section 2255 and has not received from
10 the Ninth Circuit certification as required by Sections 2244 and
11 2255, this court does not have jurisdiction to consider the
12 merits of this second motion. United States v. Allen, 157 F.3d
13 661, 664 (9th Cir. 1998).

14 However, when the court deemed petitioner's earlier motion
15 to be a Section 2255 motion, the court neglected to follow the
16 procedure mandated by United States v. Seesing, 234 F.3d 456, 464
17 (9th Cir. 2000):

18 When presented with a pro se motion that
19 could be recharacterized as a 28 U.S.C. §
20 2255 motion, a district court should not so
21 recharacterize the motion unless: (a) the pro
22 se prisoner, with knowledge of the potential
23 adverse consequences of such a
24 recharacterization, consents, or (b) the
25 district court finds that because of the
26 relief sought that the motion should be
recharacterized as a 28 U.S.C. § 2255 motion
and offers the pro se prisoner the
opportunity, after informing the prisoner of
the consequences of recharacterization, to
withdraw the motion. Under either scenario,
the pro se prisoner has the option to
withdraw the motion and file one all-

1 inclusive 28 U.S.C. § 2255 motion within the
2 one-year statutory period.

3 Because the court failed to follow this procedure when
4 recharacterizing petitioner's prior motion as a Section 2255
5 motion and because the instant motion is filed within the one-
6 year statutory period, the court concludes that the instant
7 motion cannot be deemed to be a second or successive Section 2255
8 motion and that this court has jurisdiction to consider the
9 grounds for relief asserted in the instant motion.

10 B. Waiver of Attorney-Client Privilege.

11 Before the court can require the United States to respond to
12 this Section 2255 motion, petitioner must advise the court
13 whether he is willing to waive the attorney-client privilege with
14 respect to the claims made in this motion. See Bittaker v.
15 Woodford, 311 F.3d 715, 720 (9th Cir. 2003) (If petitioner wishes
16 to go forward with his claims of ineffective assistance of
17 counsel as the basis for relief under Section 2255, he must waive
18 the attorney-client privilege to the extent necessary to give the
19 United States a fair opportunity to defend those claims).
20 Therefore, the court orders petitioner to file a pleading
21 specifically advising the court that petitioner waives the
22 attorney-client privilege with respect to the claims made in this
23 motion within 30 days of the filing date of this order. Failure
24 to timely comply will result in the denial of this motion. All
25 further proceedings shall be by order of this court.

26 ///

1 IT IS SO ORDERED.

2 **Dated: August 3, 2005**
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE